In the Supreme Court
OF THE
United States

OCTOBER TERM, 1971

No. 71-148

JOHN KALIN FUNERAL HOME, INC., d/b/a Lacey Funeral Home, a corporation, *Petitioner*,

vs.

HOLLIS FULTZ and JANE DOE FULTZ, his wife, ROBERT J. SELENE and ARLENE SELENE, his wife, and KENNETH N. EROS and BETSY EROS, his wife, d/b/a Selene and Eros Mortuary, and DON MCCAUGHAN and LUCILLE MCCAUGHAN, his wife, d/b/a Mills and Mills Funeral Service, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

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Respondents.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

Petitioner prays that a Writ of Certiorari be issued to review the judgment of the United States Court of

Appeals for the Ninth Circuit entered in the above entitled case on May 28, 1971. The Memorandum Decision and Order Granting Summary Judgment of Dismissal appears at Cr. 849-855 and is reported at 313 F.Supp. 435. The Findings of Fact and Conclusions of Law appear at 1971 Trade Cases ¶73,446. The opinion of the United States Court of Appeals for the Ninth Circuit is as yet unreported. These opinions and findings, and the Judgment of Dismissal are attached hereto as Appendix A herein.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on May 28, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether retailers whose essential resale items (caskets) are either purchased in interstate commerce for resale in the original package or almost entirely composed of articles manufactured outside the state of resale are subject to the provisions of the federal antitrust laws.

2. Whether this Court's opinion in *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963) that the Sherman Act protects traders from arbitrary exclusion from the means needed to effectively compete by combination or conspiracy is to be enforced to the full extent of Congress' power under the Commerce clause.

3. Whether the appellate court developed tests of "incidental" or "remote" affect upon interstate commerce used to defeat federal jurisdiction is contrary to this Court's rulings that Congress possesses plenary power over trade and commerce in this nation.

STATUTES

Statutory provisions are Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1, 2; Section 4 of the Clayton Act, 15 U.S.C. §15. These are printed and attached hereto as Appendix B herein. In addition, there are attached hereto State of Washington statutes regarding coroner's jurisdiction over remains, Revised Code of Washington 68.08.010; 36.24.155. These are also part of Appendix B herein.

STATEMENT OF CASE

Petitioner's complaint was filed on August 1, 1967 (Cr. 1-7). A jury trial was demanded by petitioner. The complaint asserts the violation of the federal antitrust laws among the respondents. The respondents are the coroner of the County of Thurston, State of Washington, Hollis Fultz (and his wife) and two funeral homes competitive to the funeral home of the petitioner herein. The respondent funeral homes are: Selene & Eros Mortuary, owned and operated by Robert J. Selene and Kenneth Eros, partners; and Mills & Mills Funeral Service, owned and operated by Dan McCaughan. The wives of these persons are also named as defendants under Washington's Marital

Community laws. The complaint alleges that the respondents entered into a combination and conspiracy to divide among themselves the business of arranging for and handling funeral services in Thurston County which are investigated by the coroner (called coroner cases), with the purpose and intent of excluding petitioner from said business. It further alleges an attempt to monopolize the business of arranging for and handling funeral services for coroner cases in the Thurston County area, State of Washington, and to enforce a concerted boycott in refusing to refer any coroner cases originating in said area to the petitioner (Cr. 3-4).

The conspiracy was alleged to be in the course of interstate commerce in the purchase of supplies from out of state sources and in the cutting and fabrication of woods used in the making of casket shells (Cr. 5-6).

The answers of respondents deny the essential averments of the complaint (Cr. 35-38; 45-46; 47-49). Respondents did admit the allegations concerning their identity and operations.

Extensive pre-trial discovery took place and a pre-trial order was filed which covered the contentions of the parties and the claimed issues to be resolved in the action (Cr. 818-848, filed 1/30/70). Interstate commerce was made an issue of law (Cr. 845) as follows: (1) Are plaintiff or defendants engaged in interstate commerce so as to make applicable the provisions of the Sherman Act? (2) Do the activities of the defendants in operating their mortuary business have sufficient impact on interstate commerce to give rise to jurisdiction of the Federal Court under the Sherman Act?

Petitioner had theretofore reserved its objections that the interstate commerce issue should be decided as one of fact (Cr. 798).

Following the filing of the pre-trial order, the trial court decided the motions for summary judgment and dismissal theretofore filed by the defendants (Cr. 253-264; 507-511; 713-717). It entered its order on April 9, 1970 (Cr. 849-855). Thereafter, it entered its Findings of Fact and Conclusions of Law (Cr. 877-880). A judgment of dismissal was entered May 28, 1970 (Cr. 881, Appendix A herein).

The papers of petitioner disclose that its very existence was dependent on federal antitrust protection from the alleged conspiracy. An Affidavit in Opposition to Motion to Dismiss was filed by an officer of petitioner. This affidavit filed October 22, 1969, stated, in part, at Cr. 743, paragraph 4:

> "Affiant avers that the boycott herein threatens the future economic life and success of John Kalin Funeral Home, Inc.; if the conspiracy and boycott are permitted to continue in the future, plaintiff's business may fail, and its failure will be caused as the result of defendants' violation of the antitrust laws. Plaintiff will then cease to be a factor in performing funeral services on remains thereafter shipped in interstate commerce; plaintiff will thereafter of course, not be a purchaser of caskets, embalming fluid and other matters that it now regularly purchased from suppliers outside the state of Washington, and then shipped in interstate commerce to plaintiff's business in the state of Washington, for ultimate use and consumption within this state."

(a) Nature of the Business.

Funeral homes derive their basic profits from the sale of caskets (Deposition of R. J. Selene, 11/15/68, pp. 23-28). Funerals are priced by determining a fixed business cost of handling a funeral and then adding to it double the cost of the casket (Id.).

Funeral homes render services which usually involve embalming and/or burial in a casket generally sold by the funeral home (Cr. 362-370; 374-385; Cr. 585-587).

Very few persons arrange for advance funeral service and burial. It is stipulated that the number of these pre-need cases is a small percent, ranging between 1% and 5% (Cr. 823). Between 99% and 95% of the funeral home's business depends on the ability of the funeral home to have direct contact with the next of kin.

The discovery engaged in by petitioner raised an issue of fact, as follows (Cr. 839):

> "That once a body is taken to Selene & Eros and Mills & Mills Mortuary as a holding facility, in the vast majority of cases, funeral arrangements are made with the funeral home initially having possession of the remains, when the next of kin calls at the funeral home to identify the remains and claims the personal belongings.
>
> "That having possession of a body is 90% of the achievement in obtaining the ancillary services of embalming, funeral services and burial."

The critical opportunity for this direct contact by a funeral home with the next of kin is usually dependent

upon police officers, deputy sheriffs, state highway patrolmen, firemen and county coroners. This is because arrangements must be made for transportation of the dead body and these officials are either the first on hand or the persons the public are most likely to contact. They are thus in the position to effect the rotation system which is the subject of the action.

In the absence of a designation by the next of kin as to a particular funeral home, law enforcement personnel in Thurston County, under the guidance of the county coroner, will alternate the transportation of dead bodies to the respondent funeral homes only (Cr. 836, and see deposition of D. McCaughan, 11/8/67, pp. 30-43, 92-104; R. J. Selene, 11/9/67, pp. 50-57, 90-92; H. B. Fultz, 9/15/67, pp. 9, 20-28; 10/30/68, pp. 49-51, 53-57).

Once the body reaches the funeral home, the next of kin will either undertake funeral arrangements or designate that the body be shipped elsewhere (Admitted Fact, Nos. 18, 19, 20, 21; Cr. 822). Where the remains are taken from respondent funeral homes the cases are referred to as "embalming only" or "ship out" cases (Admitted Fact, No. 21, Cr. 822). Petitioner's business has included providing embalming and other funeral services on a substantial number of military personnel (Disputed Fact, Cr. 830). The respondent funeral homes also perform embalming services as to bodies which are later transported out of state (Disputed Fact, Cr. 831).

(b) Scope of Conspiracy Involved.

The Pre-trial Order disclosed the following to be issues of fact:

"Shortly after opening a funeral home in Lacey, Washington, petitioner's officers contacted the county coroner, Hollis Fultz, and were informed that coroner cases[1] were rotated equally between every funeral home in the county (Cr. 834).

Respondent, Hollis Fultz, represented to petitioner's officers that petitioner would be placed on the equal rotation system with the other funeral homes (Id.).

That respondents, and each of them, met at various times and places, and conversed with each other on the telephone following the disclosure by respondent Hollis Fultz to Selene & Eros and Mills & Mills that petitioner would in the future commence business as a funeral home in Lacey, Washington (Cr. 834-835).

That petitioner's officers talked with respondent Hollis Fultz, on a number of occasions both before and after March, 1965, and respondent Fultz indicated that he had to talk the matter over with "the boys" (Cr. 836)."

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[1]In coroner cases the county coroner is required to sign the death certificates of persons who die suddenly without medical attention or where the circumstances of death indicate death by unnatural or unlawful means or suspicious circumstances, or bodies upon which a coroner's autopsy or post-mortem or coroner's inquest are to be held. (Revised Code of Washington, §68.08.010, Appendix B herein). A doctor will sign a death certificate as to persons he has been attending (Cr. 823-824). In Thurston County there is no morgue so that the county coroner utilizes private funeral homes in the cases within his jurisdiction (Admitted Fact, Nos. 18, 19, Cr. 822). Even in those cases, however, where there is an attending physician, deputy sheriffs, city policemen, other law officers or the county coroner will be informed of the death.

That respondent's reference to "the boys" was in fact a reference to respondents Robert Selene, Kenneth Eros and Dan McCaughan (Cr. 836).

That respondents and each of them determined to prevent the opening of petitioner's funeral home. That respondent Robert Selene actively aided and assisted and encouraged the filing and prosecution of a legal action by the Cunninghams, seeking to enjoin and prevent the construction of the Lacey Funeral Home during late 1964 (Id.).

That the practice for many years before 1965 was for the county coroner to equally rotate on alternate months, the privilege of transporting and holding bodies to a respondent funeral home (where there was no other direction by the next of kin) (Id.).

That petitioner proposed entry as a competitor, and the actual entry from and after March 1965, in Thurston County, did require an alteration of the previous system of handling funeral cases; that instead of having an equal rotation among all the funeral homes in the county, that respondents and each of them agreed to boycott petitioner from participating in the rotation system (Cr. 836-83).

That Mills & Mills Mortuary has been designated by the county coroner to participate in the even numbered months, and Selene & Eros during the odd months of the year in the transportation and holding of dead bodies pursuant to a rotation system when there is no immediate designation by the next of kin of a funeral home is admitted (Admitted Facts, Nos. 23-24, Cr. 823).

The effect of this allocation system is to prevent petitioner from ever obtaining funerals where remains are dependent upon transportation by order of law enforcement officers, the coroner or firemen. (Cr. 839).

(c) Proof of Conspiracy.

The record disclosed the following:

1. That the respondent funeral homes receive remains as a holding facility, in lieu of a county morgue, pursuant to an allocation system, is admitted (Pre-trial Order, Cr. 822, 823).

2. The respondent Robert J. Selene testified in a civil action brought against petitioner, theretofore filed on May 7, 1964. The lawsuit sought to prevent petitioner's further construction of its funeral home. As part of his testimony, Mr. Robert Selene testified that the practice of playing funeral music during funeral ceremonies would constitute an "additional depressing reminder of the business next door". The case was dismissed by a state court judge and a judgment was rendered in favor of petitioner, January 6, 1965 (Cr. 825-826).

3. It is not admitted, but there was placed in issue, the fact that county coronor, Hollis Fultz, disclosed to petitioner that coroner cases were rotated equally between every funeral home in the county and that petitioner would be placed on an equal rotation system with the other funeral homes (Cr. 834).

4. It is not admitted, but there was placed in issue, the fact that respondents conversed with one another following Fultz's statement that petitioner would be placed on the rotation system as a funeral home in

Thurston County (Cr. 841-843), and that the county coroner stated to petitioner he would have to discuss petitioner's placement in the rotation system with respondent funeral homes (Cr. 836).

5. It is not admitted, but there was placed in issue, the fact that respondents Robert Selene, Kenneth Eros and Dan McCaughan have, in the past, aided and assisted the county coroner, Hollis Fultz, in various ways such as making substantial political campaign contributions to his election fund, and in giving Christmas presents and gratuities to the county coroner, and the deputy coroners, and to law enforcement officers in Thurston County, and providing free transportation service for the county coroner from his home to the scene of a death, and other manners presently unknown to the petitioner (Cr. 837).

6. It is not admitted, but there was placed in issue, the fact that the county coroner allocation system operated without approval from the county commissioners (Cr. 837-838).

7. It is admitted that the petitioner has been excluded from the allocation system employed by the county coroner (Cr. 822-823, paras. 19-24).

(d) Interstate Trade and Commerce.

The aforesaid conspiracy to eliminate petitioner from a source of major revenue in the funeral home business and the means employed were alleged to be in the course of interstate trade and commerce. The record in summary judgment showed as follows:

Caskets, which are the basic element of the funeral home business, are either manufactured out of state and shipped directly into the state or the necessary parts of the casket are manufactured out of the state and assembled in the state or the materials came from out of state (Undisputed Facts, No. 31, Cr. 824; Findings of Fact, No. 5, Cr. 879).

Funeral homes are requested to transport human remains outside the state (Findings of Fact, No. 6, Cr. 879). The Requests for Admission submitted by petitioner to respondents show that Mills & Mills transported 51 of such cases out of the state of Washington during the period January, 1965 to October, 1969, and that Selene & Eros transported 42 of such cases out of the state of Washington (Cr. 831-832). During the period 1966-1967, petitioner transported at least 175 cases of remains of servicemen under a military contract (Cr. 830).

Petitioner proved that in coroner cases alone: that is, cases in which the death certificate was signed by the county coroner, for the period 1965 through March, 1968, $20,586.09 of caskets were purchased by respondent funeral homes (Cr. 362-370; 374-385; admitted at 585-587).

(e) Opinions Below.

The basis for the dismissal by the learned trial Court was that the federal Court had no jurisdiction over the subject matter. The District Court reasoned that the conduct alleged violative of federal antitrust law involved intrastate commerce only and that petitioner could not

prove interstate commerce was directly and substantially involved or affected. The learned Court failed to view the funeral home as a conduit of interstate caskets and, instead, viewed the cause of action as involving purely local activities within Thurston County and that the allocation system had no relation to interstate commerce (Cr. 853).

As to the contention that funeral homes disposed of dead bodies out of the State of Washington, the learned Court held that the funeral homes themselves never crossed the state lines in delivering bodies for shipment; that they performed purely local activities; and, that the mortuary services rendered on said dead bodies are not "trade or commerce" within the policy meaning of the Sherman Act. With respect to the purchasing of supplies needed by funeral homes in the conduct of the business, the Court ruled that all supplies were delivered to and came to rest in the funeral home establishments and were never resold as supplies in original packages or otherwise (Cr. 854).

The United States Court of Appeals ruled that a prior decision in which the Court held that a local garbage disposal business was not in the course of interstate commerce as a matter of law and that the plaintiff must prove that the violative conduct substantially affected interstate commerce by affecting the interstate portion of the plaintiff's business, rather than the incidental interstate aspects of his purely local business, was controlling here. *Sun Valley Disposal Co. v. Silver State Disposal Co.*, 420 F.2d 341 (9th Cir., 1969).

REASONS FOR GRANTING THE WRIT

I

THE NINTH CIRCUIT HAS RESTRICTED THE PROTECTION OF THE SHERMAN ACT IN CONFLICT WITH THE PURPOSE OF CONGRESS TO EXTEND TO ITS UTMOST POWER SHERMAN ACT PROTECTION TO ALL BUSINESSES.

A. This Court has Held that Federal Jurisdiction Under the Sherman Act Arises When Parties are in per se Violation of the Act and the Restraint is in the Course of Interstate Commerce or When Purely Local Activities Must Inevitably Affect Interstate Commerce.

The Sherman Act condemned the objectives of the conspiracy involved here as well as the means utilized. The papers in summary judgment established that petitioner can prove that respondents entered into a conspiracy with the object of eliminating its competition to them and utilized the unlawful means of entering into an allocation system in unreasonable restraint of trade.

The pre-trial order signed by the parties and the Court, discloses the existence of federal issues which cannot be decided in summary judgment (Cr. 818-848). The pretrial order disclosed that there are issues of fact as to whether or not the respondents entered into a conspiracy for the purpose and object to exclude petitioner from the funeral home business in Thurston County. This record has been heretofore discussed under the headings in the Statement of The Case, supra.

Further analysis of the record discloses that the respondents did not present any evidence which would allow a federal Court to conclude as a matter of law that petitioner did not have equal facilities with the competitive funeral homes who were in the rotation system. There is, further, no evidence that the county coroner

submitted the rotation system employed by him to the county commissioners or to state agencies or to state officers, or in anywise obtained a ruling as to the determination to prevent the petitioner from participating in the rotation system.

When a combination and conspiracy deprives a person from access to the means needed to successfully compete, a boycott, in unreasonable restraint of trade, *per se*, arises. *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963). Or, it has brought about a market division also in *per se* restraint of trade or commerce. *United States v. Sealy, Inc.*, 388 U.S. 350 (1967).

Since the violative conduct involved here is unlawful *per se*, whether the objectives of the conspiracy be considered, or whether attention is focused on the unlawful boycott or market division, and the conduct is connected to interstate trade and commerce, the Sherman Act necessarily applies. It is the contract, combination or conspiracy in restraint of trade or commerce which Section 1 of the Act strikes down, and the amount of interstate trade involved is not material since Section 1 of the Act brands as illegal the character of the restraint not the amount of commerce affected. *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150, 224, fn. 59 (1940). Since funeral homes are simply conduits in the sale of caskets which are derived from out of state purchase or are composed almost entirely of materials acquired out of the state of resale, the conspiracy inevitably involves interstate commerce. *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). And, even assuming that the courts below were correct in holding that a

course of interstate commerce is not involved here, and that purely local activity is involved in the holding of dead bodies, the effect of the conspiracy here was to unnaturally divert $20,000 in casket purchases. Yet, it is now undisputed that $8,000 is sufficiently substantial an amount to raise federal jurisdiction under the antitrust laws. *United States v. Bensinger Co.*, 430 F.2d 584 (8th Cir. 1970). Indeed the Ninth Circuit has heretofore held that $3,000 is not *de minimus* in a cemetery case brought under the National Labor Relations Act. *N.L.R.B. v. Inglewood Park Cemetery Association*, 355 F.2d 448, 450-451[2] (9th Cir. 1966) cert. den. 384 U.S. 951 (1966). The *Sun Valley* case, relied on by the learned Court below, was decided without discussing *Burke v. Ford*, 389 U.S. 320 (1967). But in *Burke*, this Court declared that the federal antitrust laws apply to wholly local conspiratorial conduct in *per se* violation of its declaration without regard to proof of its quantitative effect upon the showing that the conspiracy involved the purchase of articles manufactured out of the state by manufacturers who were in no wise participants in the conspiracy.

Federal respect for local regulation does not, this Court has ruled, allow conspiracies to abrogate the fundamental federal right of a qualified trader to enter into a lucrative market free of a conspiracy directed at him. The right to participate, if qualified, in a free and open market place is guaranteed by the federal antitrust laws, and such right

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[2] "We cannot ignore the fact that business concerned with death is 'big' business, and the Board has determined that in the interlacings of business across state lines the particular operation can and may affect interstate commerce adversely."

cannot be taken away by combination or conspiracy, even assuming general governmental regulation in the market place (which does not specifically exempt the particular conduct involved). This rule, announced in *Silver v. New York Stock Exchange, supra,* goes to any part of commerce where interstate commerce is utilized or inevitably affected. *Burke v. Ford,* supra. This is the declaration of the federal Congress in the Sherman Act and the courts have no authority to limit the scope of federal power which protects this fundamental right. *United States v. South-Eastern Underwriters Ass'n,* 322 U.S. 533 (1944).

B. The Rationale of "Incidental Affect on Interstate Commerce" Has Been Specifically Rejected By This Court, But Has Been Revitalized By The Learned Court Below.

This Court in *Mandeville Island Farms v. American Crystal Sugar Co.,* 334 U.S. 219 (1947) taught that the Sherman Act's application was no longer to rest on sophisticated court developed tests of "production", "manufacture", "incidental" and "indirect" (334 U.S. at 231). Rather, the Court has declared that Congress' power over interstate commerce is plenary and that its rules with regard to freedom of trade apply over all businesses whose activities are dependent upon interstate commerce. *Wickard v. Filburn,* 317 U.S. 111 (1942). The use of labels "incidental" or "purely local" cannot be, it is respectfully submitted, utilized to defeat or hinder Congressional power. Yet the learned Court below has, in three decisions, raised the doctrine of "incidental flow of supplies" as a limitation of federal authority before reaching the inquiry of whether or not the conspiracy involved a *per se* restraint of trade. *Page v. Work,* 290 F.2d 323 (9th Cir.

1961) cert. den., 368 U.S. 875 (1961); *Sun Valley Disposal Co.*, 420 F.2d 341 (9th Cir. 1969), and the opinion below, Appendix A herein. To allow the Circuits, it is respectfully urged, to determine the scope and protection of the federal antitrust laws in terms of "incidental affect" allows the Sherman Act to be placed in a sea of doubt in *per se* violation cases where federal antitrust application will depend upon arbitrary applications of judicial views as to what is "incidental" and what is "direct". The net effect is that the learned Court below has limited the power of the federal Congress. But Congress' power over restraints of trade is plenary. Clearly, the use of the doctrine of "incidental restraint" in Sherman Act cases is now without authority. *Burke v. Ford, supra; United States v. Perez,* ..... U.S. ..... (1971); 39 L.W. 4484 (1971). The power of Congress under the Sherman Act is deemed to be exercised to its utmost extent. *Radovich v. National Football League,* 352 U.S. 445 (1957). The Fifth Circuit has specifically held that the law as to Congressional power under the Commerce clause developed in cases concerning Congress's power under other interstate commerce statutes is supportive of jurisdiction under the Sherman Act. *City of Fort Lauderdale v. East Coast Asphalt Corp.*, 329 F.2d 871 (5th Cir. 1964), cert. den., 379 U.S. 900 (1964). Clearly, the sale of caskets to the next of kin is in the course of interstate commerce and is not incidental to the funeral home business. The mere assemblage of wood and fabricated parts in the state, but drawn from out of state sources, does not end interstate commerce as a matter of law. *Plymouth Dealers Ass'n of No. Cal. v. United States,* 279 F.2d 128 (9th Cir. 1960).

As to the district court's opinion, it stated that two decisions were decisive in its opinion in denying petitioner a trial by jury, *Elizabeth Hospital, Inc. v. Richardson*, 269 F.2d 167 (8th Cir. 1959), cert. den., 361 U.S. 884 (1959) and *Riggall v. Washington County Medical Society*, 249 F.2d 266 (8th Cir. 1957), cert. den. 355 U.S. 954 (1958). Analysis of these holdings discloses that *Elizabeth Hospital, Inc. v. Richardson*, supra, relied on *Riggall* and that it held that plaintiff, in order to establish federal jurisdiction under the antitrust laws, must show a public injury to establish his cause of action. But *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, supra, *Radovich v. National Football League*, supra, and *Radiant Burners Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961), have reversed this holding. *Elizabeth Hospital* specifically claims that federal power cannot cover retail establishments. This determination is clearly contrary to law now established by this Court in the civil liberty field, as well as the antitrust field. *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Daniel v. Paul*, 395 U.S. 298 (1969); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, supra; *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954). The rule announced by this Court in *Silver v. New York Stock Exchange*, supra, requires a federal trial under the Sherman Act as to whether or not petitioner was arbitrarily prevented from the means of effectively competing in a lucrative market as a result of the combination or conspiracy alleged. It is petitioner's federal right to be free of such combination; to either be allowed to bid competitively or to participate in a reasonable rotation system.

Courts are not to add additional requirements to stand in the way of the recovery of damages arising from violation of federal law enacted for the protection of all businesses. This Court should grant this petition to decide this issue.

II

EVEN ASSUMING THE COURT BELOW IS CORRECT IN HOLDING THAT THE APPLICATION OF FEDERAL ANTITRUST LAWS IS TO DEPEND UPON WHETHER THE INTERSTATE ASPECTS OF A LOCAL BUSINESS IS ONLY INCIDENTAL, THE COURTS BELOW HAVE ERRONEOUSLY PREVENTED PETITIONER FROM PROVING THAT FUNERAL HOMES ARE IN THE COURSE OF INTERSTATE COMMERCE OR THAT THE RESTRAINT HERE AFFECTED A SUBSTANTIAL AMOUNT OF INTERSTATE COMMERCE.

A. Summary Judgment Cannot Be Used To Dispose of Genuine Issues of Fact.

Each learned Court below simply refused to consider the fact that the sale of caskets is in the course of interstate commerce and that funeral homes are simply conduits of title. See *Cathay Mortuary-Wah Sang v. Funeral Directors of San Francisco, Inc.*, 1965 Trade Cases ¶71,505 (N.D.Cal. 1965).

But the trier of fact is to determine whether a funeral home business is in the "course of commerce". The right to federal antitrust law protection stems from viewing commerce practically, drawn from the course of business, and not from technical legal concepts. *Swift & Co. v. United States*, 196 U.S. 375 (1905); *Plymouth Dealers' Ass'n of No. Cal. v. United States*, 279 F.2d 128 (9th Cir., 1960); *Northern California Pharmaceutical Ass'n v.*

United States, 306 F.2d 379 (9th Cir., 1962), cert. den. 371 U.S. 862 (1962); *City of Fort Lauderdale v. East Coast Asphalt Corp.*, 329 F.2d 871 (5th Cir. 1964), cert. den. 379 U.S. 900 (1964); *Hardrives Co. v. East Coast Asphalt Corp.*, 329 F.2d 868 (5th Cir. 1964), cert. den. 379 U.S. 903 (1964); *Consolidated Edison Co. of New York v. DiNapoli*, 1970 Trade Cases ¶73,218 (S.D.N.Y. 1970).

As such, the flow of commerce involved here is to be factually determined by a jury under petitioner's demand for a jury trial. Also, whether respondents unlawfully diverted at least $20,000 of casket purchases is, at the least, an issue of fact which will inevitably follow from a finding of the entry into violative conduct here. *Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700 (1969); *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969).

III

ASSUMING THAT THE NINTH CIRCUIT IMPLIEDLY RULED THAT STATE ACTION EXEMPTED THE CONDUCT HERE FROM ANTITRUST CONSEQUENCES BECAUSE THE INTERSTATE COMMERCE INVOLVED WAS INCIDENTAL COMPARED TO THE DESIRE OF CONGRESS NOT TO INTERFERE WITH STATE ACTIVITY, SUCH RULING CANNOT BE SUPPORTED BY THE RECORD AND WOULD NOT BE IN ACCORD WITH DECISIONS OF THIS COURT.

A. The Record Discloses That the County Coroner Did Not Submit the Determination as to Whether to Refuse to Allow Petitioner to Participate in the Allocation System to Valid State Authority or to Duly Constituted Government Officials, but Rather, Determined to Talk the Matter Over With "The Boys".

Despite the serious allegations in this complaint as to official misconduct, the respondents, in summary judgment, in no way attempted to assert that the County Coroner sought legitimate government approval of his rotation system. On the contrary, respondents sought a motion to dismiss upon allegations that Mr. Fultz, the County Coroner, told petitioner's official that petitioner's requested participation in the allocation system would be discussed by him with "the boys".

But, under this Court's decision in *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690 (1962) the possession of a governmental agency, allowing the general allocation of supplies, does not immunize private parties from the consequences of arbitrary allocation which injures a competitor. The Courts, in meeting the contention of state immunity, view the grant of authority in the light of the antitrust laws and Congress's plenary power over interstate commerce. When no reasonable interpretation of the applicable delegation of governmental

authority authorizes power to be used to exclude competition, or implies that any means may be used to suppress competition, the federal law will be applied even to the defeat of orders given under color of law. This is especially so when private persons are shown to have embarked upon a plan to eliminate competition, as here. Further, the record here amply demonstrates that the County Coroner received gratuities from respondent funeral homes. From such evidence, the jury can conclude a corrupt bargain and the abdication of governmental authority. As such, no court can conclude, as a matter of law, that state action was involved here as distinguished from the surrender of a governmental function to the interests of a private conspiracy. There can be no findings of implied governmental immunity in this case. See dissenting opinion of Judge Browning in *Sun Valley Disposal Co. v. Silver State Disposal Co.*, 420 F.2d 341, citing *Harman v. Valley National Bank*, 339 F.2d 564 (9th Cir. 1964); and see *Bankers Life & Cas. Co. v. Larson*, 257 F.2d 377 (5th Cir. 1958), cert. den. 358 U.S. 879 (1958); *Hecht v. Pro-Football, Inc.*, ... F.2d ..... (D.C.Cir. 1971), 1971 Trade Cases ¶73,559.

There is, of course, no showing in this record that the state legislature in enacting a coroner's jurisdiction statute, Revised Code of Washington, § 68.08.010. (Appendix B herein), contemplated that the county coroner was free to enter into any type or kind of agreement to restrain the trade of any qualified funeral home. On the contrary, that section refers to the county coroner receiving the approval of the county commissioners in his handling of the remains of deceased persons. No such approval is shown in this record.

Of course, neither of the Courts below have specifically based their decision upon any implied or expressed grant of state power.

WHEREFORE, it is respectfully concluded that conspiracy alleged here is actionable; that the Courts below have erroneously deprived petitioner of its right to be protected by the federal antitrust laws from a conspiracy *per se* in restraint of trade in its objectives and in the unlawful means employed. It is respectfully submitted that the doctrine of this Court in *Silver v. New York Stock Exchange* is to be applied nationwide, and, as such, the decision below cannot stand in the light of Congress's plenary power over interstate commerce.

Respectfully submitted,

MAXWELL KEITH,
GEORGE K. FALER,
Attorneys for Petitioner.

(Appendices Follow)

Appendix A

United States District Court
Western District of Washington
Southern Division

No. 3680

John Kalin Funeral Home, Inc., d/b/a Lacey Funeral Home, a corporation,
Plaintiff,

vs.

Hollis Fultz and Minnie Fultz, his wife, Robert J. Selene and Arlene Selene, his wife, and Kenneth N. Eros and Betsy Eros, his wife, d/b/a Selene and Eros Mortuary, and Don McCaughan and Lucille McCaughan, his wife, d/b/a Mills and Mills Funeral Service,
Defendants.

MEMORANDUM DECISION
and
ORDER GRANTING SUMMARY JUDGMENT
OF DISMISSAL

In this action plaintiff Kalin seeks recovery from defendants Fultz, Mills and Selene and Eros (S & E) for treble damages per Section 7 of the Clayton Act for

alleged violation of Section 1 of the Sherman Act. Plaintiff alleges defendants have conspired among themselves and with others to monopolize mortuary business, i.e., preparation of the bodies of deceased persons for the purposes of funeral, burial or cremation, within Thurston County in the State of Washington. Plaintiff also alleges defendants have conspired to boycott plaintiff from participation in a rotation system whereby Fultz, Thurston County Coroner, in lieu of a County Morgue, rotates dead bodies that come within his jurisdiction between Mills and S & E *for retention until* mortician services are provided by the next of kin, or, in default thereof, pursuant to state statute.

Defendants deny jurisdiction in this court to hear and determine plaintiff's claims under the Sherman Act and on that ground have filed motions for summary judgment of dismissal.

Summary judgment may not be granted when any party either has not had a full and fair opportunity for complete discovery or where any genuine issue of a material fact is presented. Therefore, all parties, and particularly plaintiff, have been given every opportunity over a period of many months for discovery and presentation of written and oral argument on the defendants' motions. A final pretrial order has been entered as to jurisdiction and liability issues. Also, counsel have certified that discovery as to facts pertaining to jurisdiction has been fully completed and exhausted by all parties.

The court has fully examined and considered defendants' motions, all contentions of plaintiff and defendants

pertaining thereto and all depositions, affidavits, memoranda and authorities cited therein.[1]

It is elemental that purely local commercial transactions and activities that do not directly and substantially affect interstate commerce do not establish jurisdiction in federal district courts to hear and determine treble dam-

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[1]The decisions cited by the parties in their memoranda and principally relied upon are:

(a) For the plaintiff:

Klor's v. Broadway-Hale Stores, 359 U.S. 207 (1959)
United States v. Women's Sportswear Assn., 336 U.S. 460 (1949)
United States v. Yellow Cab Co., 332 U.S. 218 (1947)
Washington State Bowling Prop. Assn. v. Pacific Lanes, Inc., 356 F.2d 371 (9th Cir. 1966), cert. den. 384 U.S. 963 (1966)
Breier v. Northern California Bowling Proprietor's Assn., 316 F.2d 787 (9th Cir. 1963)
Northern California Pharmaceutical Assn. v. United States, 306 F.2d 379 (9th Cir. 1962), cert. den. 371 U.S. 862 (1962)
Ellis v. Carter, 291 F.2d 270 (9th Cir. 1961)
Mathison v. Armbrust, 284 F.2d 670 (9th Cir. 1960), cert. den. 365 U.S. 870 (1961)
Las Vegas Merchant Plumbers Assn. v. United States, 210 F.2d 732 (9th Cir. 1954), cert. den. 348 U.S. 817 (1954)

(b) For the defendants:

Page v. Work, 290 F.2d 323 (9th Cir. 1961), cert. den. 368 U.S. 875 (1961)
Lieberthal v. North Country Lanes, Inc., 332 F.2d 269 (2nd Cir. 1964)
Hotel Phillips, Inc. v. Journeymen Barbers, Etc., 301 F.2d 443 (9th Cir. 1962)
Elizabeth Hospital, Inc. v. Richardson, 269 F.2d 167 (8th Cir. 1959), cert. den. 361 U.S. 884 (1959)
Williams v. Howard Johnson's Restaurant, 268 F.2d 845 (4th Cir. 1959)
Lawson v. Woodmere, 217 F.2d 148 (4th Cir. 1954)
Monument Bowl, Inc., v. Northern Cal. Bowling Prop. Assn., 197 F.Supp. 208 (N.D.Cal., S.D. 1961), rev. 316 F.2d 787 (9th Cir. 1963)
Brenner v. Texas Company, 140 F.Supp. 240 (N.D.Cal., S.D. 1956)

age claims pursuant to the Clayton Act amendment to the Sherman Act. *United States v. Women's Sportswear*, supra; *United States v. Yellow Cab Co.*, supra; *Page v. Work*, supra; *Las Vegas Merchant Plumbers Assn.*, supra.

Plaintiff's allegations of fact, which it contends support federal jurisdiction or, at a minimum, raise issues of fact for determination by jury, are stated under "Plaintiff's Contentions on Disputed Facts," beginning on page 13, of the Pre Trial Order. The allegations are summarized as follows: that plaintiff and defendants perform mortician services upon dead bodies that have come from outside the state or are shipped outside the state after such services are performed; that plaintiff and defendants regularly purchase mortuary supplies, including caskets, embalming fluid, equipment and other items from sources outside the state; that materials used in making caskets in this state come from outside the state; and that morticians in this state regularly and frequently conduct business correspondence by letter, telephone and telegram with persons outside the state.

Defendants contend the alleged activities complained of are wholly intrastate and local in nature and have no direct and substantial effect upon interstate commerce so as to bring them within the purview of the Sherman Act.

In considering all of the principal authorities (citations in footnote 1), two decisions of the Eighth Circuit Court of Appeals are most comparable in facts to the present case: *Elizabeth Hospital v. Richardson*, supra, and *Riggall v. Washington County Medical Society*, 249 F.2d 266 (1957), cert. den. 355 U.S. 959 (1958) [cited in *Elizabeth*].

Plaintiff contends *Washington State Bowling v. Pacific Lanes* impairs the holding of *Elizabeth*, although *Shepard's* discloses no decision to that effect. Analysis of the opinion in that case shows it does not directly or indirectly hold the principles of *Elizabeth* inapplicable to the particular facts and circumstances of the present case. *Elizabeth* is not referred to in the *Bowling* opinion.

In *Elizabeth* the Eighth Circuit said:

> "We think that the plaintiff's operation of a hospital, to include rendition of hospital services to some persons who came from outside the state, is no more engaging in interstate commerce than was Dr. Riggall in rendering medical services to persons who likewise came from other states. The fact that some of the plaintiff's patients might travel in interstate commerce does not alter the local character of plaintiff's hospital. If the converse were true, every country store that obtains its goods from or serves customers residing outside the state would be selling in interstate commerce. Uniformly, the Courts have held to the contrary." (At page 170)

In *Riggall* the Court stated:

> "As has been observed, plaintiff's complaint in substance is that the practice of his profession would have been more profitable to him had the defendants not deprived him of membership in the Washington County Medical Society. Plaintiff was not prevented from practicing his profession and the complaint, we think, is wholly lacking in allegations essential to a cause of action under the Sherman Antitrust Act." (At page 270)

Both *Elizabeth* and *Riggall* were decisions affirming dismissals by the District Court upon jurisdictional grounds.

In the State of Washington a county coroner has jurisdiction over dead bodies in his county only in certain situations specified by state statute.[2] Another recently enacted state statute provides that when a person dies without having made prior arrangements for his funeral and mortician services and no one is willing to make such arrangements, the county coroner is to assign the dead body on an equal rotational basis to funeral homes and mortuaries in the county where the body is found.[3] The jurisdiction of Coroner Fultz over dead bodies is limited to Thurston County. The alleged conspiracy as to the statutory rotational system occurred in and necessarily was operative only in Thurston County. Thus, the alleged conspiracy to monopolize and boycott is directed solely at local activities within Thurston County, i.e., the rotation system and mortuary businesses conducted in Thurston County. No broader objectives of conspiracy are alleged, e.g., price fixing, rigged bidding, etc. *Spears Free Clinic and Hospital v. Cleere,* 197 F.2d 125 (10th Cir. 1952) Clearly, the activities complained of are purely local and are not so related to interstate commerce as to be a part thereof within the Sherman Act.

The decision to ship dead bodies to or out of the state of Washington is vested in next of kin or in military authorities in certain instances. Kalin cannot make that decision, is not in the business of shipping dead bodies and, as to dead bodies shipped to or from this state, its only functions are incident to the preparation of dead bodies for funeral, burial or cremation purposes and are

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[2]R.C.W. 68.08.010.
[3]R.C.W. 36.24.

wholly performed in Thurston County. Kalin exercises no discretion as to matters pertaining to the shipment of bodies, excepting only to deliver bodies for shipment at the direction of those having control of the bodies. Kalin itself never crosses state lines in delivering bodies for shipment. *United States v. Yellow Cab,* supra. To this court it is inconceivable that functions limited to those Kalin has performed in the shipment of dead bodies can or should be held "trade or commerce" within the policy and meaning of the Sherman Act.

Plaintiff contends the purchase of mortuary supplies from outside this state and business communications to and from other states are sufficient to establish jurisdictional requirements under the Sherman Act. At most, the purchase of supplies by interstate shipment and the sending and receiving of interstate communications might be factors which, together with other factors, might support jurisdiction. *Washington State Bowling v. Pacific Lanes,* supra. However, in the present case all supplies were delivered to and came to rest in plaintiff's establishment and were never resold as supplies, in original packages or otherwise. *Lawson v. Woodmere,* supra and *Northern California Pharmaceutical Assn. v. United States,* supra. No authority has been cited or found directly or indirectly sustaining Sherman Act jurisdiction based merely upon interstate communications conducted in the regular course of an otherwise purely local business.

For the reasons stated and on all the facts of record it is clear this court does not have jurisdiction of the controversy alleged in this action. Accordingly, IT IS ORDERED that defendants' motions for summary judg-

ment of dismissal should be and hereby are granted. Findings of Fact, Conclusions of Law and Judgment conforming to this order may be presented for entry at the early convenience of counsel.

IT IS SO ORDERED this 9th day of April, 1970.

/s/ Geo. H. Boldt,
United States District Judge

Filed April 9, 1970,
U.S. Dist. Court,
Harold W. Anderson, Clerk.

United States District Court
Western District of Washington
Southern Division

No. 3680

John Kalin Funeral Home, Inc., d/b/a Lacey Funeral Home, a corporation,
Plaintiff,

vs.

Hollis Fultz and Minnie Fultz, his wife, Robert J. Selene and Arlene Selene, his wife, and Kenneth N. Eros and Betsy Eros, his wife, d/b/a Selene and Eros Mortuary, and Don McCaughan and Lucille McCaughan, his wife, d/b/a Mills and Mills Funeral Service,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come on regularly before the Court upon the motions of all defendants for summary judgment of dismissal for lack of jurisdiction; and a final agreed Pretrial Order having been entered herein in which all agreed facts and contentions of the parties on the issues of jurisdiction and liability are fully set forth; counsel having certified discovery of all facts pertaining to jurisdiction has been completed and exhausted by all

parties; written and oral argument on defendants' motions having been fully presented by all parties; the Court having thoroughly considered and examined all material in the record pertinent to defendants' motions; the Court having made and entered its written Memorandum Decision and an Order Granting Summary Judgment of Dismissal on April 9, 1970, which, by this reference, is hereby incorporated herein to the same effect as though fully set forth in all particulars; proposed Findings of Fact and Conclusions of Law of all parties having been submitted to the Court; and being fully advised in the premises, the Court does hereby make and enter the following Findings of Fact and Conclusions of Law to the extent not specifically found and held in the written Memorandum Decision and Order Granting Summary Judgment of Dismissal entered by the Court.

FINDINGS OF FACT

1. This action was commenced in this United States District Court for the Western District of Washington, Southern Division, by the plaintiff, John Kalin Funeral Home, Inc., d/b/a Lacey Funeral Home, a corporation, claiming treble damages under Section 7 of the Clayton Act for alleged violation of Section 1 of the Sherman Act by defendants.

2. All parties to this action are residents of the state of Washington and maintain offices and transact business within Thurston County, Washington, in the jurisdiction of this Court.

3. Plaintiff commenced operating its business in Thurston County at Lacey, Washington in March of 1965,

and from that time through the year 1968 there were only three operating funeral homes in Thurston County; namely, the plaintiff and defendant funeral homes. Defendant Hollis Fultz was at all times material hereto the coroner of Thurston County.

4. During the period in question in this case Fultz, the coroner, in lieu of a County Morgue, rotated dead bodies that came within his jurisdiction between defendant funeral homes for retention until final disposition was provided for by next of kin or, in default thereof, by state statute.

5. Both plaintiff and defendant funeral homes regularly purchase mortuary supplies, including caskets, embalming fluid, equipment and other items from sources outside the state of Washington. Certain materials used in making caskets in the state of Washington come from outside the state.

6. Plaintiff and defendant funeral homes on some occasions perform mortician services upon dead bodies that have come from outside the state of Washington, or are shipped outside the state after such services are performed.

7. Morticians in the state of Washington regularly and frequently conduct business correspondence by letter, telephone and telegram with persons outside the state.

8. The mortician services performed by plaintiff and defendants are wholly performed in Thurston County, Washington.

9. The funeral homes in question exercise no individual discretion as to matters pertaining to the shipment of bodies.

10. None of the funeral homes in question cross state lines in delivering bodies for shipment.

11. All mortician supplies used by plaintiff and defendant funeral homes are utilized in the performance of mortician services and are not resold as supplies.

From the foregoing FINDINGS OF FACT the Court makes the following

CONCLUSIONS OF LAW

1. There are no genuine issues as to any material fact relating to the issue of jurisdiction of this Court as invoked by plaintiff.

2. The activities complained of by plaintiff are wholly intrastate and purely local in nature, being limited to Thurston County in the state of Washington, and said activities have no direct nor substantial effect upon interstate commerce so as to bring them within the purview of the Sherman Act.

3. This Court is without jurisdiction over the controversy alleged in this action.

4. Accordingly, defendants' motions for summary judgment of dismissal should be and hereby are granted.

Dated this 28th day of May, 1970.

/s/ Geo. H. Boldt,
United States District Judge

Filed May 28, 1970.
U.S. Dist. Court,
Harold W. Anderson, Clerk.

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United States District Court
Western District of Washington
Southern Division

Civil Action No. 3680

John Kalin Funeral Home, Inc., d/b/a Lacey Funeral Home, a corporation, Plaintiff,

vs.

Hollis Fultz, et al., Defendants.

JUDGMENT OF DISMISSAL

THIS MATTER, having come on regularly before the court on the motions of the defendants for summary judgment of dismissal of this matter; and the court hav-

ing heard argument of counsel and having heretofore entered its Findings of Fact and Conclusions of Law; now, therefore, it is hereby

ORDERED, ADJUDGED AND DECREED that the defendants' motions for a summary judgment of dismissal be, and they hereby are granted, and the plaintiff's complaint be, and it is hereby dismissed with prejudice; it is further

ORDERED, ADJUDGED AND DECREED that the defendants be, and they are hereby granted judgment for their costs incurred in this action against the plaintiff in the sum of $.....

Dated this 28th day of May, 1970.

/s/ Geo. H. Boldt,
United States District Judge

Presented by:
Davies, Pearson, Anderson & Gadbow
Counsel for Selene & Eros Mortuary
By: Vincent L. Gadbow
Judgment of Dismissal

Filed May 28, 1970.
U.S. Dist. Court.
Harold W. Anderson, Clerk.

United States Court of Appeals
for the Ninth Circuit

[May 28, 1971]

JOHN KALIN FUNERAL HOME, INC., d/b/a Lacey Funeral Home, a corporation, *Appellant*, vs. HOLLIS FULTZ and JANE DOE FULTZ, his wife, ROBERT J. SELENE and ARLENE SELENE, his wife, and KENNETH N. EROS and BETSY EROS, his wife, d/b/a Selene and Eros Mortuary, and DON MCCAUGHAN and LUCILLE MCCAUGHAN, his wife, d/b/a Mills and Mills Funeral Service, *Appellees*.	No. 26,343

Appeal from the United States District Court
Western District of Washington

Before: Jertberg, Ely and Kilkenny, Circuit Judges

Per Curiam:

Appellant's action for treble damages under the Sherman Antitrust Act, 15 U.S.C. §§1 and 2, was dismissed by the trial court on a motion for summary judgment. It appeals. We affirm.

A careful examination of the record convinces us that the fundamental issue in this case cannot be distinguished

from the one before the court in *Sun Valley Disposal Co. v. Silver State Disposal Co.*, 420 F.2d 341, 343 (9th Cir. 1969), where, on facts highly similar to those in the instant case, the question was resolved against the appellant. We hold that *Sun Valley* is here controlling on this issue.

Cathay Mortuary Wah Sang v. Funeral Directors of San Francisco, Inc., 1965 Trade Cases, Para. 71,505 (N.D. Cal. 1965), a district court decision relied on by appellant, is entitled to consideration, but is distinguishable in at least two important respects. There, plaintiff alleged that: (1) defendants deprived plaintiff of membership in a national association of funeral directors, thereby depriving it of the opportunity to make purchases of caskets and other funeral merchandise at national conventions at substantially lower prices; and (2) loss of membership in the national association divested plaintiff of the right to be listed in the national directory used to make contracts with out-of-state funeral directors for the interstate removal and shipment of bodies. Neither of these charges is made against appellees in the case before us.

AFFIRMED.

Appendix B

SHERMAN ANTITRUST ACT

Act of July 6, 1890, Chap. 647, 26 Stat. 209, as amended: 15 U.S. Code, Secs. 1, 2:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: *Provided*; That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 5, as amended and supplemented, of the Act entitled "An Act to Create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between re-

tailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. [July 2, 1890, Chap. 647, Sec. 1, 26 Stat. 209; August 17, 1937, Chap. 690, Title VIII, 50 Stat. 693; July 7, 1955, Chap. 281, 69 Stat. 282; 15 U.S. Code, Sec. 1.]

Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one years, or by both said punishments, in the discretion of the court. [July 2, 1890, Chap. 647, Sec. 2, 26 Stat. 209; July 7, 1955, Chap. 281, 69 Stat. 282; 15 U.S. Code, Sec. 2.]"

CLAYTON ACT

Section 4 of the Clayton Act, October 15, 1914, Chap. 323, § 4, 38 Stat. 731, 15 U.S.C. § 15, provides:

"Sec. 4. That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sus-

tained, and the cost of suit, including a reasonable attorney's fee."

REVISED CODES OF WASHINGTON

68.08.010 *Coroner's jurisdiction over remains.* The jurisdiction of bodies of all deceased persons who come to their death suddenly without medical attendance, or where the circumstances of death indicate death was caused by unnatural or unlawful means, or suspicious circumstances, or bodies upon which a coroner's autopsy or post mortem or coroner's inquest is to be held, or dead bodies not claimed by relatives or friends, is hereby vested in the county coroner, which bodies may be placed in the morgue under such rules as are adopted by him with the approval of the county commissioners, having jurisdiction, providing therein how the bodies shall be brought to and cared for at the morgue and held for the proper identification where necessary. [1953 c 188 § 1; 1917 c 90 § 3; RRS § 6042.]

Appendix C

REVISED CODES OF WASHINGTON

COUNTY CORONER

36.24.155 *Undisposed of remains—Entrusting to funeral homes or mortuaries.* Whenever anyone shall die within a county without making prior plans for the disposition of his body and there is no other person willing to provide for the disposition of the body, the county coroner shall cause such body to be entrusted to a funeral home in the county where the body is found. Disposition shall be on a rotation basis, which shall treat equally all funeral homes or mortuaries desiring to participate, such rotation to be established by the coroner after consultation with representatives of the funeral homes or mortuaries in the county or counties involved. [1969 1st ex.s. c 259 § 2.].

IN THE

SUPREME COURT

OF THE UNITED STATES

October Term, 1971

NO. 71-148

JOHN KALIN FUNERAL HOME, INC., d/b/a LACEY FUNERAL HOME, a corporation, *Petitioner,*

vs.

HOLLIS FULTZ and JANE DOE FULTZ, his wife, ROBERT J. SELENE and ARLENE SELENE, his wife, and KENNETH N. EROS and BETSY EROS, his wife, d/b/a SELENE and EROS MORTUARY, and DON McCAUGHAN and LUCILLE McCAUGHAN, his wife, d/b/a MILLS and MILLS FUNERAL SERVICE, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for The Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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Dammeier Printing Co. - Tacoma, Washington

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BRIEF OF RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion delivered in the court below is not yet officially reported, but is appended to the Petition for a Writ of Certiorari. The Memorandum Decision and Order granting Summary Judgment of Dismissal appears at Cr. 849-855 and is reported at 313 F. Supp. 435 (W.D. Wash. 1970). The Findings of Fact and Conclusions of Law appear at 1971 Trade cases pp. 73, 446.

JURISDICTION

Respondents do not question the jurisdiction as set forth in the Petition.

QUESTION PRESENTED

The sole question decided by the trial court, the sole question considered by the Court of Appeals, for the Ninth Circuit, and the sole question presented by the Petition for a Writ of Certiorari is whether a question of fact exists as to whether or not the activities of respondents complained of by the petitioner were in interstate commerce or had a substantial effect on interstate commerce sufficient to establish jurisdiction in a Federal court to hear petitioner's claim for treble damages under the anti-trust laws.

STATUTES

The statutes involved are correctly set forth by petitioner in the Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

Petitioner alleges that the county coroner, as a result of conspiracy with co-respondent funeral homes, directed law enforcement agencies in Thurston County to deliver bodies in coroner's cases to the two respondent funeral homes on a monthly basis in rotation (Cr. 1-7).

There is no publicly owned morgue in Thurston County and thus no facilities for the holding of remains pending disposition instructions by the next of kin thereby making it necessary for respondent county coroner to use the funeral homes for the holding of the remains. Respondent funeral homes are, therefore, used by the county coroner in lieu of a county morgue as a

holding facility awaiting instructions from next of kin or other authorized persons as to the disposition of remains (Cr. 822).

In some instances where the remains are brought to one of the respondent funeral homes as a holding facility, the remains are later transported, at the direction of the next of kin, to other funeral homes for disposition (Cr. 822).

All discovery relative to the jurisdiction was exhausted by both petitioner and respondents, and all jurisdictional facts were before the court at the time the court made its decision on a motion for summary judgment (Cr. 756, 764, 769, 797).

Petitioner's sole argument and position was that issues of fact as to whether or not the Federal court had jurisdiction existed.

Respondent funeral homes exercise no discretion as to where bodies were to be shipped (Cr. 879). The decision about shipment of bodies is made by next of kin or some other person (Cr. 821, 823).

Respondent funeral homes did not cross state lines in delivering bodies for shipment or receiving bodies for shipment (Cr. 879).

All mortician supplies and other equipment used by petitioner and respondent funeral homes are utilized in the performance of mortician services and are not resold as supplies (Cr. 880).

Respondent county coroner has jurisdiction of dead bodies in Thurston County only in certain specified situations. The jurisdiction of respondent coro-

ner was limited to Thurston County. The activities complained of by petitioner occurred only in Thurston County and were operative only in Thurston County (Cr. 821).

Respondent funeral homes deny that they had done anything to prevent, hinder or obstruct the establishment of petitioner's mortuary business or to influence the respondent coroner to deprive the petitioner of any business, or that they had any influence of any kind over the respondent coroner (Cr. 843, 844).

I.

THE DECISION BELOW IS CLEARLY CORRECT

A. THE DISTRICT COURT'S GRANTING OF RESPONDENT'S MOTION FOR SUMMARY JUDGMENT, WHICH WAS AFFIRMED BY THE COURT OF APPEALS, WAS PROPER AND CORRECT, AS NO ISSUE OF FACT EXISTED ON THIS JURISDICTIONAL ISSUE.

1. Summary Judgment is a proper procedure in anti-trust litigation.

"Summary Judgments have a place in the anti-trust field," as was pointed out by this Court in *White Motor Co. v. U.S.* 372 U.S. 253, 259 (1962). See also *First National Bank of Arizona v. City Service Company,* 391 U.S. 253 (1968). Some of the Law in this area is so well developed that where the gist of the case turns on documentary evidence, the rule of the case at times can be defined without a trial. *White Motor Company v. U.S., supra* at 259. See also *Chapman v. Rudd Paint and Varnish Co.,* 409 F.2d 635,

643 (9th Cir. 1969). In *Sun Valley Disposal Co. v. Silver State Disposal Co.*, 420 F. 2d 341 (9th Cir. 1969) and *Page v. Work*, 290 F.2d 323, 330 et seq. (9th Cir. 1961), cert. den. 368 U.S. 875 (1961), summary judgment was granted on the precise jurisdictional question at issue in the instant case.

The importance of summary judgment as a procedural weapon to pierce sham claims and resolve actions where the facts are undisputed has been frequently noted by the courts. *American Mfrs. M.I. Co. v. American Broadcasting*, 388 F.2d 272, 278 (2d Cir. 1967). The 1963 amendments to F.R.C.P. Rule 56 seem to indicate that the courts thereafter were to approach the Rule with less reticence and more resoluteness. *American Mfrs. M.I. Co. v. American Broadcasting, supra* at 278; *Dressler v. MV Sanpiper*, 331 F.2d 130 (2d Cir. 1964). See also 3 Barron & Holtzoff, Federal Practice and Procedure, § 1231, at page 97 et seq. (Wright Ed. 1958).

2. The lower courts had before them a record which indicated that there existed no genuine issue on a material fact relating to the question of jurisdiction.

While this court had admonished us that summary judgments in the anti-trust field are not appropriate "where motive and intent play leading roles," *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 573 (1962); *White Motor Co. v. U.S., supra* at 259, such a warning is not appropriate here as the issue of jurisdiction cannot be so characterized as an issue of "motive or intent." This is not a case "where the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." *Poller v. Col-*

umbia Broadcasting, supra at 473; *Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700, 704 (1969).

As petitioner concedes in his brief (p.4), extensive pretrial discovery was held on the jurisdictional issue as well as on the merits of this case: The District Court had before it numerous depositions and other papers of discovery on which to base its decision. Unlike *American Mfrs. M.I. Co. v. American Broadcasting, supra,* where the summary judgment decision (subsequently reversed in favor of a jury trial) purported to decide the meaning and reasons behind complex acquisition practices of two large companies, the instant case rests upon facts, openly laid out in the record, which literally speak for themselves: The nature of the parties' funeral home business; the names and types of supplies for these businesses; the customers of the parties' businesses. Counsel in the instant case have, in fact, certified that discovery as to facts pertaining to jurisdiction has been fully completed and exhausted by all the parties (See Appendix A, ii, Petitioner's Brief).

It is not an axiom of trade regulation practice that all anti-trust litigation is inherently complex and multi-faceted. *Chapman v. Rudd Paint & Varnish Company, supra* at 643. Summary judgment is properly entered in an anti-trust action where there is an absence of any significant probative evidence tending to support the complaint, *First National Bank of Arizona v. City Service Co., supra* at 290. Both courts below had ample and complete evidence on the record before them on which to consider the jurisdictional issue. The entire scope and gamit of evidence was before the learned courts below, and there was no question of fact to be decided. The use of the summary judgment procedure was thus both warranted and appropriate.

B. THE SHERMAN AND CLAYTON ACTS, REQUIRING A "RESTRAINT OF TRADE OR COMMERCE AMONG THE SEVERAL STATES," ARE NOT WITHOUT LIMITS OF APPLICATION.

The Sherman and Clayton Acts, requiring a "restraint of trade or commerce among the several states," are not without limits of application.

It is a jurisdictional requirement of the Sherman Act that the acts constituting the violation be "in restraint of trade or commerce among the several states" (15 U.S.C. § 1). In other words, it is said that the "restraint" must be upon interstate commerce. See *United States v. Bensinger Co.*, 430 F.2d 584 (8th Cir. 1970). The general language of the Sherman Act and of the Clayton Act was designed by congress to exercise its powers under the Commerce Clause of the Constitution. U.S. Const. act 1, §8, cl. 3. *Page v. Work, supra* at 333.

"Despite the increased thrust of Federal commerce power as business operations become more interrelated and complex, the courts have consistently required that in order for Federal anti-trust jurisdiction to be sustained the effect on interstate commerce of an alleged anti-trust violation in a local area must be direct and substantial, and not merely inconsequentive, remote, or fortuitous." *Page v. Work, supra,* at 332 and cases cited therein, including *Mandeville Island Farms v.*

American Crystal Sugar, 334 U.S. 219 (1947), and *Elizabeth Hospital, Inc. v. Richardson*, 269 F.2d 167, 170 (8th Cir. 1959), cert. den. 361 U.S. 884 (1959). Although Congress created these acts to utilize the Commerce Clause's most wide-ranging implications, nevertheless "it must be *interstate commerce* which feels the pinch, or competition in *interstate commerce* which may be substantially lessened, or where there is a tendency toward the creation of a monopoly in *interstate commerce*, before the provisions of said section become applicable." *Page v. Work, supra* at 333. (emphasis added). In accord are *Klor's v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 211 (1959); *Mandeville Island Farms v. American Crystal Sugar, supra* at 232.

Even the most far-reaching and broad interpretations of the scope and nature of the Commerce Clause consistently recognize that the nub of a Federal antitrust act is the adverse effect of the complained of behavior on *interstate commerce*. *Wickard v. Filburn*, 317 U.S. 111, 125 (1942), and cases cited below.

Unlike cases involving the N.L.R.B., *N.L.R.B. v. Inglewood Park Cemetery Ass'n.*, 355 F.2d 448 (9th Cir. 1966), cert. den., 384 U.S. 951 (1966) or Consumer Credit Protection Act, *Perez v. United States*, ... U.S. ..... (1971), 39 L.W. 4484, where "a class of activities" (see also *Atlanta Motel v. U.S.*, 379 U.S. 241 (1964)) is defined by Congress to be *per se* prescribed by the particular Federal act in question, Congress has left to the courts to determine whether interstate or intrastate activities have the prohibited effect on commerce, as in the Sherman Act. See *United States v. Darby*, 312 U.S. 100, 120-121, (1940), which makes this distinction.

II.

THERE IS NO CONFLICT OF DECISION

A. EXTENSIVE LITIGATION IN THIS FIELD, IN THIS COURT AND IN OTHERS BELOW IT, HAS DEVELOPED A CONSISTENT THEORY OF REQUISITES FOR THE VALID APPLICATION OF THE FEDERAL ANTI-TRUST ACTS.

No amount of partisan argument can disguise the fact that the courts have consistently — and without aberration by any circuit—developed clear and unconfused guidelines as to valid application of the Federal anti-trust acts where matters of jurisdiction are at issue.

"There are two tests to determine whether interstate commerce is involved: (1) whether the acts complained of occurred within the flow of the interstate commerce; or (2) whether the acts complained of while wholly intrastate, substantially affected interstate commmerce". *Sun Valley Disposal Co. v. Silver State Disposal, supra* at 343. In accord using the precise language cited above, including the word "substantially" in reference to otherwise intrastate acts, are: *United States v. Bensinger, supra* at 588; *Lieberthal v. North Country Lanes,* 332 F.2d 269, 270 (2d Cir. 1964); *Page v. Work, supra* at 331; *Elizabeth Hospital, Inc. v. Richardson, supra* at 170; *Las Vegas Merchant Plumbers Ass'n v. U.S.,* 210 F.2d 732, 739 (9th Cir. 1954), cert. den., 348 U.S. 817 (1954); *Hotel Phillips, Inc. v. Journeyman Barbers,* 195 F. Supp. 664 (W.D. Mo., 1961) aff'd, 301 F.2d 443 (8th Cir. 1962).

Petitioner rails at great length in his brief about alleged *per se* violations of the anti-trust acts by respondents (i.e. p.14 et seq.), apparently believing that

"*per se*" restraints of any trade or commerce automatically signal Sherman and/or Clayton Act violations. This is the result of a misreading of the statutes themselves (see Section A. above) and of subsequent court decisions construing these statutes.

Where the activities complained of are of an intrastate character, in order for there to be a Sherman and Clayton Act violation, it must be shown that the restraint directly and substantially affects interstate commerce. *United States v. Bensinger, supra* at 588 and cases cited below. "Where the activities are interstate in nature, the interstate commerce issue depends upon whether the restraint is a *per se* violation of the Act. . . . Where there is a *per se* violation, the effect upon interstate commerce follows as a matter of law and is conclusively presumed." *United States v. Bensinger, supra* at 588 and in cases cited below.

It is clear from the above-quoted language that the *per se* presumption only comes into effect where the *activities complained of are interstate in nature.* It is not, as petitioner would like to argue, an automatic presumption. The first question to be decided is always whether the alleged conspriacy was intrastate or interstate in character. It is only after this important characterization is made that the Federal acts and any presumptions that might be construed to be inherent in them, can be properly considered.

B. THESE REQUISITES WERE PROPERLY APPLIED BY THE COURTS BELOW, IN THE INSTANT CASE.

Plaintiff argues that since *Burke v. Ford,* 389 U.S. 320 (1967), the mere purchase of supplies in interstate commerce is sufficient to invoke Federal jurisdiction. They argue that the test of jurisdiction set forth in *Sun Valley, supra* and *Las Vegas, supra,* for determining jurisdiction has been erased by the *Burke* decision.

This is misreading *Burke.* In that case, plaintiff alleged that defendant wholesalers of liquor had agreed to divide the liquor market for the entire State of Oklahoma. Thus, six wholesalers from Oklahoma City sold in one area, six from Tulsa sold in a second, etc. In Oklahoma City and in Tulsa, the wholesalers divided the brands so that within any one area, any one brand was carried by only two or three wholesalers.

In deciding the appeal, The Supreme Court recognized the two tests previously discussed for determining jurisdiction. *Burke v. Ford, supra* at 555. The court went on to hold that state-wide territorial division of the sale of liquor manufactured out of state did, in fact, substantially affect interstate commerce.

The holding of *Burke* must be limited to its facts, that is, a state-wide market division of a $45,000,000 business. The case does not stand for the proposition that a Federal court has jurisdiction over anti-trust violations any time a company purchases materials in interstate commerce.

Plaintiff also argues that the holding in *Klor's, Inc. v. Broadway-Hale Stores, Inc., supra* at 207, is controlling in this case. In that case plaintiff alleged that the manufacturers of well known brands of appliances, such as General Electric, RCA, Admiral, etc. conspired not to sell to plaintiff or to sell at discriminately high prices to plaintiff. Plaintiff was a retail outlet for such appliances. There, the conduct complained of directly affected interstate commerce, that is, the refusal of seller to sell to plaintiff goods manufactured out of state and shipped directly to the plaintiff, and which goods plaintiff intended to resell. Also, the plaintiff complained of a price-fixing conspiracy, an allegation not present in the case at bar. In this case there is no allegation of conduct which would affect the sale of caskets or other items delivered in interstate commerce.

The incidental flow of supplies in interstate commerce does not, by itself, suffice to transform essentially intrastate activity into an interstate one within the scope of the antitrust laws. *Page v. Work, supra* at page 332 (publishing legal notices); *Elizabeth Hospital, Inc. v. Richardson, supra* at 170 (hospitals); *Lawson v. Woodmere, Inc.*, 217 F.2d 148, 149 (4th Cir. 1954 (cemetery vaults); the interstate travel of customers of the local enterprise, *United States v. Yellow Cab Co.*, 332 U.S. 218, 230-32 (1947) (taxicab service to and from railroad stations); *Elizabeth Hospital, Inc. v. Richardson, supra* at 170-71, (the solicitation of business in other states for the local enterprise); *Page v. Work, supra* at 329, (the utilization of interstate communications media); *Martin v. National League Baseball Club*, 174 F.2d 917 (2d Cir. 1949), (interstate broadcast of baseball games), or a location in an area of interstate activity, *Hotel Phillips, Inc. v. Journeyman Barbers, etc., Union, supra* (barbershops in greater Kansas City Metropolitan area.)

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Dated this 7th day of September, 1971.

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